Unpublished Order
Not To Be Cited
Per Circuit Rule 35

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

(ARGUED: FEBRUARY 23, 1982)

MARCH 15, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Thomas E. Fairchild, *Senior Circuit Judge*
Hon. Milton I. Shadur, *District Judge**

PETTIBONE CORPORATION, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.
No. 81-1679	255 NLRB No. 151

ORDER

There is evidence in the record that the keypunch employees engaged in protected, concerted activity. Lanphier's statements and actions on April 5, 1979—including his being angry, banging on the desk and telling the employees that their raise request would be held against them, that management was upset, that they would not get another "damn dime" in 1979, that they were free to leave and that he could replace the whole

* District Judge Milton I. Shadur of the Northern District of Illinois is sitting by designation.

department—tended to interfere with the exercise of their Section 7 rights. The ALJ and Board correctly found that Lanphier's conduct constituted a violation of Section 8(a)(1). We will not overturn the credibility determinations made by the ALJ and affirmed by the Board, because the credited testimony is not on its face "hopelessly incredible." *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500, 505 (7th Cir. 1977).

True enough there is no direct evidence that Craig and Cavendar, the persons who made the decisions not to rehire, were aware of the keypunchers' protected, concerted activities. However it was reasonable for the Board to infer that fact circumstantially because:

1. Crain and Cavendar ranked above Lanphier in the line of managerial supervision, and Lanphier testified that he relayed their requests to "management" and that "management" was upset.

2. Neither Craig nor Cavendar testified that he was unaware of the keypunchers' activities (Craig testified during the Board proceedings, while Cavendar did not).

3. It could reasonably be inferred that Craig and Cavendar would have known of the sick-out because it apparently caused serious disruption of operations and required the borrowing of employees from other departments.

Those facts, when viewed against the background of Lanphier's recent unlawful conduct, were sufficient to support a finding that the employees' protected, concerted activities were a motivating factor in the decisions not to rehire.

Moreover, the Board found that Pettibone's assertion that the decisions were based on company policy was a transparent pretext. That finding is not clearly erroneous, inasmuch as the record shows that the alleged policy had never been put in

writing or communicated to employees, that even supervisor Elam was unaware of it and that Pettibone's witnesses were unable to furnish any testimony as to the purported policy's age, origin or precise working details. We do not imply by this ruling that the company should be expected to notify each employee who quits without notice that he or she will not be considered for rehiring. Instead we consider that on the record before the Board it could reasonably conclude that no such policy existed in fact. In turn, the company's advancement of a pretextual reason could reasonably be considered by the Board in weighing the other evidence before it.

Accordingly, Pettibone failed to show that the employees would not have been rehired in the absence of their protected conduct. *See Peavey Co. v. NLRB*, 648 F.2d 460 (7th Cir. 1981). There is substantial evidence to support a finding that the failure to rehire the keypunchers violated Section 8(a)(1).

While there appear to be certain imperfections in the decision of the ALJ, they are not determinative of the issues before us. Accordingly, the Board's order will be enforced.

Unpublished Per Curiam Order

NLRB JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 15, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Thomas E. Fairchild, *Senior Circuit Judge*
Hon. Milton I. Shadur, *District Judge**

PETTIBONE CORPORATION,
Petitioner,
No. 81-1679 vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
255 NLRB No. 151

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the National Labor Relations Board is ENFORCED, with costs, in accordance with the opinion of this Court filed this date.

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* District Judge Milton I. Shadur of the Northern District of Illinois is sitting by designation.

255 NLRB No. 151

D—7634
Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PETTIBONE CORPORATION

and

Case 13—CA—18642

DAISY FRISON, an Individual

DECISION AND ORDER

On January 19, 1981, Administrative Law Judge Harold Bernard, Jr., issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

D-7634

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Pettibone Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. April 20, 1981

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

Don A. Zimmerman, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD-16-81
Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

PETTIBONE CORPORATION

and **Case 13-CA-18642**

DAISY FRISON, An Individual

Linda McCormick, Esq., of Chicago, IL, *for the General Counsel.*
Ralph A. Morris, Esq., of Chicago, IL, *for the Respondent.*

DECISION

Statement of the Case

HAROLD BERNARD, JR., Administrative Law Judge: This case was heard on November 5 and 6, 1979, in Chicago, Illinois on complaint issued May 1979 alleging, as later amended, that the Respondent threatened employees with economic reprisals, and refused reinstatement to employees, because of their protected concerted activity, thereby violating Section 8(a)(1) of the Act. Respondent denies the commission of any unfair labor practices.

Upon consideration of the entire record, the demeanor of the witnesses and the briefs filed by the parties, I make the following:

Findings and Conclusions

I. Jurisdiction

The parties agree, the record shows, and I find that Respondent, a heavy industrial equipment manufacturer in Chicago, Illinois, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Unfair Labor Practices

On April 5, 1979, keypunch operator supervisor Earline Elam told employees in her department that unlike the prior year, when some of such work was sent out, operations manager Mike Lamphier wanted the group to do all the inventory this year—that the inventory cards were coming in and due to the employees' good work in inventory the previous year, he intended to assign them all the work. The keypunch operators punch documents from Respondent's factory offices, timecards, and job tickets, providing input to Respondent's computer systems. This news from Elam was greeted by employees with some misgivings because of difficulty arising from inaccuracies in the coding information and because the work would require substantial overtime hours. The record shows that, in addition, in their view the keypunch employees worked in crowded, dusty, unair-conditioned unsatisfactorily lighted and even hazardous physical surroundings—that the news of Lamphier's expected assignment prompted them, as a group, to request a meeting with him on the subject.

The Meeting on Thursday, April 5

Lamphier came upstairs from the computer room and met with employees at 9:30 a.m., informing them he had 80,000

cards he wanted punched and verified, in about 2 weeks, or some one-half the time required the previous year. Employees raised objections about working conditions pointing out the lack of air-conditioning and the difficulty of doing the work in the afternoon after regular working hours. Employees also raised objections to poorly-lit surroundings in the keypunch operators' working area, and to being "hemmed in" by empty boxes resulting in narrow passageways and a partially blocked fire exit stairway. As discussion continued, employee Corene Jones asked about a raise in pay for the keypunch operators and Lamphier replied that the employees had already gotten one in January—a reference to Respondent granting a "government guideline"—type increase at that time—whereupon Jones told him, "We still want a raise now." Keypunch operator Barbara Thomas told Lamphier ". . . if not a raise what about a bonus or something?" referring to the fact that this was going to be extra work. When Lamphier told the employees he would "see" about getting the raise but did not think they would get one, Jones asked if there was anyone else ". . . we could go to?" Lamphier replied, "No, I do not want you to get in any *trouble.*" (Emphasis added.)

Lamphier returned upstairs later that afternoon and I find from employee accounts in the face of Lamphier's substantial admissions and only partial failure to recall, that he told them heatedly, at times banging the desk, that management was angry because they asked for a raise, that they were not going to get another damn dime this year and if they did not like it that they could leave. I further find credible the testimony by Corene Jones corroborated by Delores Jones, that Lamphier told the assembled group of keypunch operators, Corene Jones, Arline Turner, Pandora Mitchell, Delores Jones, Barbara Thomas, and Daisy Frison, that ". . . he was red (faced) and he also said that when it came time for our (salary) review that it would go against us." Agreed supervisor Elam supports em-

ployee accounts that Lamphier also told employees, "there is the door" and that they were free to leave. Employee Jones also credibly testified that employee Frison asked why it "would go against us," and "if we were not going to get a raise, why there would be a review." Jones recalls further Lamphier telling them ". . . we were not going to get anything and that if we did not like it then we could all leave, that he could replace the whole department." At the conclusion in Lamphier's remarks, the group indicated willingness to perform the inventory and the meeting ended. It is axiomatic that the employees' discussion of working conditions and request for a pay increase to Lamphier at this meeting constituted the clearest form of protected concerted activity under the Act, and that therefore Lamphier's threatened economic and employment-related reprisals, *viz*, that their conduct would go against them in their pay reviews and reference to replacing them because of those activities, the only basis shown by the record for such responses, is a violation of Section 8(a)(1) of the Act. I so find.

April 9 and 10

When Lamphier departed, Frison, C. Jones, Mitchell, D. Jones, and Thomas discussed Lamphier's responses among themselves, expressing resentment over Lamphier's statements and conduct generally. The group decided in Frison's words that whoever could come in on the following Saturday, April 6, to do inventory would come and if anybody had something else to do ". . . we'd do that." Frison was out of town Friday and Saturday but C. Jones, Thomas, and Mitchell worked. Also, deciding that since Lamphier had talked to them that way, and "they" (Respondent) would be hurt by (employees not working Tuesday) Monday and Tuesday, the keypunch operators called in sick on the following Monday and Tuesday, April 9 and 10, and did not report for work those days.

The Employees Quit on Wednesday, April 11

After Elam asked Lamphier to do something Tuesday, April 10, in light of the employees' obviously concerted action, suggesting he talk to them, Lamphier agreed to do so and Elam contacted the employees through one of them, by telephone asking them to return Wednesday, April 11, for a meeting with Lamphier. The next morning, the employees clocked in at 8 a.m. and worked until 9 a.m. when Lamphier was available to see them. The employees gathered in the computer room, where Lamphier apologized for losing his temper and left to respond to a call elsewhere. While absent, Lamphier's supervisor, Tom Nast inquired what had happened and after listening to a description of the events told the group that Lamphier should not have spoken to them angrily. When Lamphier returned, he asked if everything was straightened out and when one of the employees asked if there would be a raise, he said no. Lamphier told the employees they could return to work. Upon returning to their department upstairs, the group discussed events, some saying they could not work under such conditions, some noting the absence of any change in things, or Lamphier's attitude, and some expressing themselves as being too upset to work any further. As testified by Frison, in short, "We decided to quit," and did so. Elam urged caution and further deliberation on employees but finally called Lamphier about developments and was told to collect their badges and bring them downstairs. Instead, Lamphier and Tom Nast, themselves came upstairs and picked up the badges.

The Respondent's Refusal to Rehire the Former Keypunch Operators

The parties stipulate that the keypunch operators quit on April 11, and Respondent admits that it decided against rehiring them afterward due to a company policy against doing so whenever an employee has left without notice, variously

defined further by Respondent witnesses as "proper notice" or as "two weeks notice." But Respondent argues further that neither Corene nor Delores Jones ever requested rehiring and that Barbara Thomas, who likewise made no such request, was also not an employee but rather held the status of an independent contractor. There is no dispute that Frison and Mitchell called Craig for their jobs, on April 16, and were refused rehire—Frison being told it was out of the person's hands, the other simply "sorry." I further find that Corene Jones called in to Craig on the same day Frison called and was also refused rehire.

Regarding the issue raised by Respondent's allegation that Delores Jones and Thomas never asked to be rehired and thus were not refused reemployment, little more need be noted than that Respondent's own witness and admitted keypunch supervisor, Earline Elam, in a meeting the week after the employees quit, when production matters were in a state of transition, attended by Elam, Lamphier and Respondent's corporate vice president Thomas Cavendar asked Respondent to put all the employees back to work. Elam testified, "Well, he asked me what he (Cavendar) could do for me. So I asked him could he get my girls back. And he told me that he cannot do that. He wished he could but he could not do that because the girls walked out and it was against the company policy to hire them back because they walked out like that." There is no room for any doubt in this record that Respondent knew the keypunch operators, two of whom admittedly called in to request rehire, one whom I find did so, Corene Jones and two whose conduct in this regard is in dispute, but all of whom were named in the original charge dated April 16, 1979, and served upon Respondent which alleges that Respondent refused to *reinstate* them had sought a return to work. It is not disputed that Respondent made no effort to countermand the decision not to rehire Elam's "girls" as communicated to Elam by Cavendar,

and, lest there be any question remaining, there is also no indication that from at least the date of the charge there was no reasonable question for Respondent to now seriously urge that the employees had not communicated a desire to return to work after quitting. Had there been any real question about the matter in Respondent's view of events, it is reasonable to suppose Respondent would have inquired into the charge allegation in such limited regard, but it made no such effort. Since Respondent's division comptroller Mike Craig testified that the Elam-described meeting occurred late in the same week ". . . that the girls called in," this would place the meeting wherein Cavendar denied Elam's request to rehire the employees as after the 16th of April, the day Frison and the two others testified they asked for their jobs back, and the charge was filed which, I find, effectively communicated to Respondent that the keypunch operators had sought to return to work but alleged they had been thwarted in those efforts. Based upon the foregoing, it is not within the realm of reasonable argument for Respondent to raise the thinly technical position, that it did in effect, not know the two employees, Thomas and Delores Jones wanted a return to their employment. I find that it did know and further, in light of the Elam-described meeting, that any additional requests, other than what did occur, would have been futile—in short Respondent's argument is academic and without merit. I find, regarding Mitchell, Frison, and Corene Jones that they asked for and were denied rehire on April 16, in calls to Mike Craig, and that D. Jones and Thomas were effectively denied rehire on April 19 (or 20), the date of the Elam-described meeting.

Barbara Thomas' Status

Except for an accommodation by Respondent with Thomas' work schedule whereby she is allowed to leave early to work elsewhere, and the absence of fringe benefits or

standard deduction in her compensation, Thomas' working conditions are identical with those of other admitted employees in the keypunch department. She receives the same rate of pay, works generally the same hours, doing the same work on the same equipment under the same immediate and overall supervision as other keypunch operators in the same office and with the same overtime work opportunities. The fact that Thomas "bills' the Respondent for such work, signs in on a paper and is paid out of a different account maintained by Respondent, does not alter the fact that Respondent totally controls Thomas' work efforts and compensation. I find that Thomas does not occupy the status of an independent contractor in her employment relationship with Respondent but rather is an employee with rights protected by the Act. She does not bear the earmarks of an independent entrepreneur with power to control her own profit and loss, but rather, is employed in this capacity, I find, for the obvious economic convenience of her employer. *Avis Rent A Car System, Inc.*, 173 NLRB 1366, 1367; *R. L. Stott Company and R. L. Stott Heating and Air Conditioning Company*, 183 NLRB 884, 885; and, *National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc.*, 153 NLRB 1536, 1539.

Respondent's Policy Defense

Respondent urges that the employees were denied reemployment for the policy reason that they quit without notice and such action thereby prevented them from being considered for reemployment. Such position, however, is based upon a policy never reduced to writing, not communicated to keypunch operator supervisor Elam, and as to which only two examples—inapposite to the present case, out of 1,200 employees in 36 years were given. The flimsiness in the proof of such policy is further shown by the vagueness in details about how

the policy works and what constitutes notice, as well as the fact that its prior enforcement is put in serious question by the fact that one of the keypunch operators was rehired the year before the incidents in this case arose though she had given only a few days' notice, while on vacation, that she would not be returning to work the following week. I find it revealing that Respondent was unable to prove the existence of such a policy prior to the occurrences in this case and that its attempts to do so were so meager in the respects noted above. I further find it revealing that even were there to have been such a policy, it would not insulate unlawful conduct inasmuch as any employer policy penalizing employee exercise of rights guaranteed employees under Section 7 of the Act would have to give way to the policies of the Act. That the Respondent did not rely on such a "policy" seems to me to be borne out further by the fact that given the dire need for operators, Respondent having to "scrounge" around for employees when the former employees let it be known that they desired to return to work, something other than so illusory-like a policy must have fueled the Respondent's rejection of the employees' appeals for their work. Further substantiating this view is the fact that the employees involved had earned fine work records, free from any blemishes and, in fact, had all been complimented by supervision for their good work. Elam herself, described how the group had been praised, and given lunch, for filling in for Elam during the latter's absence from the department.

The only reason for Respondent's rejection of the keypunch operators emerging from the totality of considerations applicable herein, as described by Respondent's own witness Elam and noted above, as told her by Cavendar, was because the employees "... had walked out like that," in addition, I find, to their other efforts to improve working conditions described above. To cloak this unlawful response to employee concerted activity in the guise of a policy reason is

unavailing for Respondent, whether in the name of policy or as spontaneous retaliatory conduct, violated the Act by refusing the employees rehire because of their protected concerted activity, thereby further violating Section 8(a)(1) of the Act. Respondent's refusal to rehire the keypunch operators clearly" . . . did not occur as the automatic result of an infraction of a clearly announced and universally enforced employment policy." *Speed-O-Lith Offset Co., Inc.*, 241 NLRB No. 115 slip op. (1979). It follows from this that the advanced "policy" reason was a transparent pretext, a finding which warrants the conclusion, when combined with the employees' clearly protected activities, Respondent's knowledge thereof via Lamphier, Elam, Nast, Craig, and Cavendar and its animus towards those activities, that a clear preponderance of the evidence supports this determination. *First National Bank of Pueblo*, 240 NLRB No. 49 slip op. (1979), and *Petropak, Inc.*, 238 NLRB No. 141 slip op. (1978).

Conclusions of Law

1. Pettibone Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By threatening employees with reprisals because they engaged in protected concerted activities seeking to improve working conditions, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By refusing to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas because they engaged in protected concerted activities seeking to improve working conditions, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

III. The Remedy

Having found that Respondent violated Section 8(a)(1) of the Act, the Respondent shall be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas, the Order will provide that the Respondent offer to each of them immediate and full reemployment to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their rights and privileges and to make each of them whole for any loss of earnings they may have suffered as a result of the unlawful conduct against them by payment to them of a sum equal to that which each normally would have earned, absent the unlawful conduct against them from the respective dates Respondent refused to rehire them to the dates of the Respondent's offers of reemployment with backpay and interest computed in accordance with the Board's established standards set forth in *F. W. Woolworth Company,*[1] and *Florida Steel Corporation.*[2]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

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[1] 90 NLRB 289 (1950).

[2] 231 NLRB 651 (1977). See generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[3] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The Respondent, Pettibone Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals because they engaged in protected concerted activities seeking to improve working conditions.

(b) Refusing to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas because they engaged in protected concerted activities seeking to improve working conditions.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas immediate and full reemployment to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges and make each whole for any lost earnings with interest thereon to be computed according to the formula described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Chicago, Illinois, location, copies of the attached notice marked, "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

Dated, Washington, D.C. January 19, 1981

/s/ HAROLD BERNARD, JR.
Harold Bernard, Jr.
Administrative Law Judge

[4] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD-16-81

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE AND TO CARRY OUT ITS PROVISIONS.

WE WILL NOT threaten employees that it will go against them in reviewing them for pay increases if they engaged in protected concerted activities seeking to improve working conditions.

WE WILL NOT threaten to replace employees in the keypunch operators department because employees there engage in protected concerted activities.

WE WILL NOT refuse to rehire DAISY FRISON, DELORES JONES, CORENE JONES, PANDORA MITCHELL, and BARBARA THOMAS because of their protected concerted activities Seeking to improve working conditions.

WE WILL offer the above-named immediate and full reemployment to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, and WE WILL make each of them whole, with interest for any loss of earnings suffered by reason of our unlawful conduct against them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

PETTIBONE CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, IL 60604, Telephone (312) 353-7597.

C1

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

APRIL 13, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Thomas E. Fairchild, *Senior Circuit Judge*
Hon. Milton I. Shadur, *District Judge**

PETTIBONE CORPORATION, *Petitioner,*	Petition for Review of an Order of the National Labor Relations Board.
No. 81-1679 *vs.*	
NATIONAL LABOR RELATIONS BOARD, *Respondent.*	255 NLRB No. 151

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-entitled cause by counsel for the petitioner, which petition we consider as a petition for rehearing and a suggestion for rehearing *en banc*, no judge in regular active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* District Judge Milton I. Shadur of the Northern District of Illinois is sitting by designation.

D1

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

APRIL 22, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon.
Hon.

PETTIBONE CORPORATION, *Petitioner.* **vs.** **NATIONAL LABOR RELATIONS BOARD,** *Respondent.*	Petition for Review of an Order of the National Labor Relations Board.

No. 81-1679

On consideration of the "MOTION FOR STAY OF MANDATE" filed herein on April 20, 1982, by counsel for the petitioner,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is stayed to and including May 20, 1982.

APPENDIX E

5 U.S.C.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . .

. . . .

29 U.S.C.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,

. . . .

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

§ 160. Prevention of unfair labor practices.

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its

findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

. . . .

(f) . . . [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive.

. . . .

29 C.F.R.

§ 101.10 Hearings

. . . .

(b) . . . The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act [29 U.S.C. § 158] . . . .

. . . .